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No. 86-130

In The
Supreme Court of the United States
October Term, 1986

VICKIE LORENE ROCK,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Arkansas's rule of per se inadmissibility of hypnotically refreshed recollection violates due process of law when applied against a defendant in a criminal case whose defense necessarily depended on the recollection of and testimony concerning certain actions not remembered prior to the hypnotically induced refreshing of recollection.

2. Given the constitutionality of limiting a defendant's testimony as to post-hypnotic remembrance, then whether the order of the trial court was unconstitutionally broad, thereby being too restrictive of defendant's testimony, resulting in a denial of due process of law.

3. Given the constitutionality of the limitation of a defendant's testimony with respect to post-hypnotic remembrances, then whether the trial court erred in making arbitrary and inconsistent applications of the rule, which resulted in a denial of due process of law.

PARTIES TO THE PROCEEDINGS[1]

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[1] The caption of the case contains the names of all parties.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Arkansas is reported at 288 Ark. 566 and at 708 S.W. 2d 78, and is reprinted in full in Appendix A to the Petition for Writ of Certiorari at page i.

The order of the Supreme Court of Arkansas denying a rehearing entered May 27, 1986, is set forth in Appendix A to the Petition for Writ of Certiorari at page xviii.

The judgment of the Circuit Court of Benton County, Arkansas, entered February 22, 1985, is set forth in full in Appendix A to the Petition for Writ of Certiorari at page xvi.

The pre-trial order of the Circuit Court of Benton County, Arkansas, entered December 7, 1984, is set forth in full in Appendix A to the Petition for Writ of Certiorari at page xvii.

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JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on April 21, 1986. A timely petition for rehearing was denied on May 27, 1986. The jurisdiction of the Supreme Court is invoked under 28 USCS § 1257 on the grounds that a right or privilege of the defendant is claimed under the Constitution of the United States which right has been denied by the State.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States
Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

On July 2, 1983, Frank Rock died from a gunshot wound he received while trying to prevent his wife from leaving their apartment to get a hamburger. His wife, petitioner Vickie Lorene Rock, was charged with manslaughter in connection with the death of her husband. Petitioner employed W. B. Putman, an able and experienced trial attorney, as lead counsel in the case. As petitioner could not recall important details regarding the gun discharging, at the suggestion of and through the arrangements by Mr. Putman, she submitted to hypnosis by Dr. Bettye Back, a licensed neuropsychologist, trained in the field of hypnosis, for the purpose of refreshing her memory. (Appendix A, p. xvii) As a result of the second hypnotic session, petitioner was later able to recall that she did not put her finger on the trigger of the gun, and that the gun discharged completely by accident or mechani-

cal failure of the safety as her husband grabbed her hand during the scuffle. (J.A. 29)

The prosecution made a pre-trial motion to exclude the petitioner's testimony at the trial. A separate pre-trial hearing was held on the prosecution's motion, and at the conclusion of the hearing, the prosecution's motion was granted, and petitioner was ordered not to testify to any facts on the day of the shooting except "matters remembered and stated to the examiner prior to being placed under hypnosis." That hearing took place on November 26, 1984. (Appendix A, p. xvii)

The trial began on December 4, 1984, and on December 6, 1984, the Court was advised of an irregularity in the jury. After hearing in chambers where one juror was found to be impliedly biased, and upon motion by the state and by defendant, the Court declared a mistrial and reset a new trial for February 6, 1985. Six days later, on December 12, 1984, the lead defense counsel, Mr. W. B. Putman, died. The lead of petitioner's defense was assumed by Mr. Putman's partner, E. E. Maglothin, Jr., and his widow, Esther White, and the trial was recommenced on February 6, 1985. (J.A. 1,2)

During direct examination, the trial judge limited petitioner's testimony regarding the shooting in those statements contained in the psychologist's notes made immediately prior to the hypnosis. Petitioner was not permitted to relate to the jury the facts recalled after hypnosis or the facts previously remembered but not contained in the psychologist's notes. With the approval of the trial court, petitioner was examined directly from a copy of the psychologist's notes made prior to hypnosis. (J.A. 96)

Petitioner was convicted by the jury and sentenced by the Court to the maximum punishment allowed for the offense under Arkansas law. (J.A. 2) Petitioner appealed to the Supreme Court of Arkansas, and in the notice of appeal and designation of record, petitioner designated the entire record, "including but not limited to, all pleadings, motions, orders, exhibits, evidence and documents introduced or offered into evidence, instructions accepted, rejected and/or given, the proceedings and a transcription of the entire proceedings had in the Trial Court in the above styled cause, excluding only Voir Dire, Opening Statement and Closing Arguments made to the jury by counsel." A transcription was made by the court reporter and lodged with the Supreme Court of Arkansas with the exception that the pre-trial hearing on the prosecution's motion to limit the petitioner's testimony was not included as part of the transcript. The Supreme Court of Arkansas did not have before it the transcript of the pre-trial hearing; only the cross-examination of the neurophychologist by the prosecuting attorney introduced as an exhibit by the defense. (Transcript)

The brief for petitioner made no attempt to correct or fill in the record pursuant to Rule 6(d) of the Rules of Appellate Procedure. No objection to the incompleteness of the transcript was made by the Attorney General nor was any attempt made to abstract that omitted portion of the transcript. By an opinion delivered April 21, 1986, the judgment of the trial court was affirmed without mention of the missing portion of the transcript. (Appendix A, p. i) Timely petition for a rehearing was denied on May 27, 1986, again without mention of the omitted portion of the transcript either by counsel or by the Court.

(Appendix A, p. xviii) The pre-trial order of the trial court was included in the transcript and was abstracted on appeal.

The points raised here on appeal were specifically raised in a brief submitted to the trial court on October 22, 1984, prior to the entry of the order in question on December 7, 1984, and again in petitioner's brief to the Supreme Court of the State of Arkansas. The failure to transcribe the hearing on which the restrictive order was based is noted here for the first time.

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SUMMARY OF ARGUMENT

The order of the trial court denying petitioner the right to testimony of matters remembered and stated after being placed under hypnosis constitutes a denial of due process of law in that it denied petitioner the right to testify in her own behalf, and improperly limits her right to effective counsel.

The order of the trial court was unconstitutionally broad in limiting the testimony of petitioner to matters remembered and stated to the neuropsychologist prior to being placed under hypnosis.

The order by the trial court was inconsistently applied, and was thereby arbitrary and unreasonable in limiting the actual testimony of petitioner not only to matters remembered and stated to the neuropsychologist, but to matters included in the handwritten notes of the neuropsychologist

and the transcript of the cross examination of the neuropsychologist by the prosecuting attorney at the pre-trial hearing.

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ARGUMENT

I.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE PRE-TRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO TESTIFY IN HER OWN DEFENSE.

Vickie Rock was denied the right to testify in her own defense as to facts and events that occurred on the day her husband died except those facts and events noted by the hypnotist prior to hypnosis. Petitioner submits that the right of a defendant to testify in her own behalf as to the events which constitute the alleged crime should be nearly absolute. The state suggests that where testimony is thought to be the product of hypnosis the jury should not be allowed to hear and consider such testimony.

Does the state have an overriding interest in excluding the testimony of a criminal defendant concerning post-hypnotic recollection? Petitioner submits that it does not, and that the burden should be on the prosecution to establish that the testimony is likely the product of improper suggestion.

The charge that the petitioner Vickie Rock was defending against was manslaughter. The critical testimony that was excluded concerned the fact that she did not have her finger on the trigger of the gun, nor did she point it at her husband; that the gun discharged by mechanical failure when the deceased grabbed the petitioner's hand. The Arkansas Supreme Court ruled that her failure to testify directly on those points is not significant. The difference between holding a gun with a finger on the trigger prepared to fire and holding a gun with a finger not on the trigger in order to prevent firing of the gun seems enormous when considering the decree of care which petitioner was exercising, a vital element in an issue of manslaughter. The importance of her failure to testify is reflected in the fact that the jury recommended the maximum punishment allowable under Arkansas Law, even though the petitioner had no prior convictions and expressed considerable remorse at the death of her husband.

In order for Vickie Rock's defense to be understood by the jury each part of the testimony was needed, both the testimony of the gun expert, who testified that the gun could and likely would discharge without the trigger being pulled and petitioner's testimony that her finger was never on the trigger of the gun. The jury could clearly have taken those two items of testimony and concluded either that the shooting was accidental or in the alternative, that petitioner's negligence was of a lesser degree than would justify the maximum punishment allowable under state law.

The Arkansas Supreme Court seemed to justify exclusion of that evidence because it was not completely ex-

culpatory, but that reasoning is not a correct interpretation of the constitutional standard as set forth in *In re Oliver,* 333 U.S. 257 (1948), which provides that a defendant in dealing with the charges against him, must have "a reasonable opportunity to meet them by way of defense *or explanation,* have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." (emphasis added) 333 U.S. at 275.

It is important to note in the instant case, there was no application of a pre-existing state rule of evidence. Indeed, the only law in Arkansas dealing with the subject was the general rule of competency under the uniform rules of evidence. That rule reads as follows:

> "Every person is competent to be a witness except as otherwise provided in these rules." Rule 601, Arkansas Uniform Rules of Evidence.

No Arkansas decision dealt with the limitation of testimony by a criminal defendant based on hypnosis or any other means of jury enhancement such as the use of drugs or any other medical or psychological means of refreshing recollection. A related rule of Arkansas evidence pertaining to the use of a writing or object to refresh memory, allows the testimony even if the object or writing was used prior to the testimony of the witness. Rule 612(b), Arkansas Uniform Rules of Evidence. That rule provides in part:

> . . .
>
> (b) . . . if, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying, and the Court in its discretion determines that the interest of justice so require, an adverse party

> is entitled to have the writing or object produced if practicable at the trial, hearing or deposition in which the witness is testifying."

No published decision in Arkansas limits the criminal defendant's right to testify. The decision of the Arkansas Supreme Court then must be construed as resting solely on its conclusion of the unreliability of hypnotically refreshed memory. To treat that testimony as unreliable and accordingly inadmissible in Arkansas, the Arkansas Supreme Court relied on the decision of the California Court in *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243 (1982). That decision in turn rests very heavily on a law review article written by Bernard L. Diamond, a professor of law at the University of California at Berkeley and a clinical professor of psychiatry at the University of California at San Francisco at the time of the publication of the article. Diamond, *Inherent Problems in the Use of Pre-trial Hypnosis on a Perspective Witness*, 68 California Law Review, 313 (1980).

That article is a strongly worded condemnation of the use of hypnosis in the pre-trial preparation of a perspective witness; however, the article specifically disclaims any relevance to the issue of the defense use of hypnosis on the defendant. In footnote 7 at page 315, Professor Diamond stated:

> "7. The following legal issues concerning the use of hypnosis will not be discussed except insofar as they relate to this topic:
>
> . . .
>
> (c) Defense use of hypnosis on a defendant for the purpose of establishing his innocence or at least eliciting some information helpful to the defense. In

> *People v. Sirhan,* 7 Cal. 3d 710, 497 P. 2d 1121, 102 Cal. Rptr. 385 (1972), for example, I hypnotized the defendant in order to obtain information which might underpin a diminished capacity defense." 68 Cal. Law Rev. at 315.

The California Court made no reference to the clear exception of a criminal defendant's right to testify in his own behalf in the article, but in placing clear limitations on the rule in that case, the Court stated:

> "Second, when it is the defendant himself—not merely a defense witness—who submits to pre-trial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf. [*People v. Robles,* (1970) 2 Cal. 3d 205, 214-215, 85 Cal. Rptr. 166, 466 P. 2d 710.]"

The case relied upon most heavily by the Arkansas Supreme Court, in answering the constitutional argument is *State v. Atwood,* 39 Conn. Sup. 273, 479 A.2d 258 (Conn. Super. 1984). That case was a published opinion of the trial court dealing with a pre-trial motion by the defendant. The defendant claimed amnesia of the events surrounding the murder of his wife and moved that the court issue a pre-trial ruling on the admissibility of his testimony, should he decide to testify after undergoing hypnotism or sodium amytal interview designed to refresh his memory. After finding that defendant had not met his burden of proof in establishing amnesia, the court went on to discuss the issue of hypnosis and only in the final few paragraphs deals with the constitutional issue.

The trial court in *Atwood* rested its entire constitutional decision on *Greenfield v. Robinson*, 413 F.Supp. 1113 (W.D. Va. 1976). But the trial court in *Atwood* apparently misunderstood the issue in *Greenfield v. Robinson*, supra. The *Atwood* court incorrectly noted that in *Greenfield* "the court held that the refusal to permit the defendant to testify *after* hypnosis did not infringe upon his right to due process." (emphasis added) 479 A.2d at 266. A reading of *Greenfield* indicates that the issues involved in *Greenfield* were substantially different from the issue envisioned by the *Atwood* court. Greenfield filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia, alleging among other things that he had been denied due process of law because the trial court refused and the Virginia Supreme Court upheld that refusal to permit defendant to testify while in a hypnotic trance and also refused to permit the defendant's expert witness to testify concerning statements the defendant made to him while in a hypnotic trance. The District Court noted that there was not much evidence to suggest that defendant would testify to anything of any substantial value to the case, and that what would be added would be otherwise completely uncorroborated. The Court then stated that under those peculiar circumstances, Greenfield's due process guarantees were not abrogated by the trial court's refusal to permit Greenfield to relate his story under hypnosis or an expert witness to recount what the defendant told him while under hypnosis.

Contreras v. State, 718 P.2d 129 (Alaska, 1986), dealt with the subject in the context of the identification of a suspect by a prosecution witness whose memory had been

hypnotically enhanced and not with the right of a defendant to testify. Indeed, although the procedure has been in widespread use in Arkansas by law enforcement agencies and prosecuting attorneys for the identification of suspects and the enhancement of memory, not a single Arkansas case has even identified, much less refused, hypnotically refreshed testimony or identification by the prosecution. The line of cases that developed to protect criminal defendants from prosecuting witnesses should not now be used to defeat the due process rights of the petitioner.

The undisputed testimony of the psychologist in this case was that the purpose of the hypnosis session with petitioner was for refreshing petitioner's memory for the assistance of petitioner's attorney in understanding the case for trial preparation. (J.A. 47, 48) The principle objection to allowing petitioner to testify seems to be that after hypnosis, she would invent memory rather than refresh what she really had. or that she cannot be cross-examined effectively because of the expertise of the hypnosis in some way shielding her mind from the rigors of cross-examination. There is no evidence that any such shielding was done in the instant case, but both of these aspects of the State's objection to petitioner's testimony were dealt with in two classic writings on evidence.

In *Basic Problems of Evidence,* Edmund M. Morgan noted that a refreshment of recollection may be done in a number of ways, sometimes even by calling the attention of the witness to something that has no logical connection with the litigation, but most frequently by a writing, and that the danger of a writing is that the witness may substitute the contents of a writing for actual memory. In noting that to allow the trial judge to determine if the

device of refreshing recollection is merely a subterfuge, Professor Morgan suggested that "Except in the most obvious cases, the memorandum will be used and the opponent's protection will lie only in cross-examination. It must be said that in such situations intelligent cross-examination will usually easily disclose whether the witness is relying upon his present memory or upon the memorandum." Morgan, *Basic Problems of Evidence* (A.L.I., 1962), p. 62. Surely the same principal applies here. The danger to the testimony is the same; in the context of due process, the test of intelligent cross-examination is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony.

The state's position assumes that the hypnotist will not be a true expert, that through his expertise the hypnotist will improperly protect the witness from himself and make him cross-examination proof. This argument of course assumes an untruthful and devious hypnotist. The bias of experts is a long standing problem. As Professor Morgan pointed out: "The abuse of expert opinion evidence in modern litigation in criminal prosecutions . . . has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than as a witness." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 Vand. L. Rev. 725 (1961).

The right to testify in one's own defense in a criminal proceeding lies at the heart of the American ideal of due process of law. *In re Oliver,* supra. Mr. Justice Black writing for the Court identified the minimum essentials of a fair trial in the often quoted sentence:

> "A person's right to reasonable notice of a charge against him and an opportunity to be heard his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S. at 273.

Expanding on that same theme, the Court identified the right in slightly different language in *Washington v. Texas,* 388 U.S. 14 (1967):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 388 U.S. at 19.

The state has argued that the right to testify is not absolute, but States may not use state rules of evidence to defeat a criminal defendant's right of due process. *Chambers v. Mississippi,* 410 U.S. 283 (1973). In holding that a technical application of the hearsay rule operated to deny the defendant in that case due process of law, the Court noted that, " . . . where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE PRE-TRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL AND THE PREPARATION OF HER DEFENSE.

The second aspect of unconstitutionality in the Arkansas decision is that in adopting the per se inadmissibility rule without distinguishing the rights of a defendant in a criminal case, the decision severely limits the right to meaningful counsel in the preparation of the defense. That right was recognized in an early California case of *Cornell v. Superior Court,* 52 Cal. 2d 99, 338 P.2d 447 (1959). That case involved a proceeding for a writ of mandamus to compel the San Diego authorities to permit the attorney for defendant to have a hypnotist accompany him to examine the defendant. The California court held that the defendant's attorney was entitled to the assistance of the hypnotist, and in so holding, noted that the basic right to counsel was not limited simply to meetings between the client and the counsel. It noted that the right included access to an interpreter, to a psychiatrist, and in general to such expert assistance as might be needed in preparing the defense.

That kind of meaningful consultation and use of hypnosis in meaningful consultation was clearly contemplated as an exception to his objection to the use of pre-trial hypnosis by Professor Diamond. Indeed, Professor Diamond in his article notes that he himself performed pre-trial hypnosis on Sirhan Sirhan for the purpose of attempting to establish a defense. Apparently, no attempt was made in that case to limit the defendant's testimony because of

Dr. Diamond's pre-trial hypnosis of him. *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

It is certainly not a right of the state to have the defendant's testimony remain in the same form or be limited to what he recalled prior to meaningful consultation with his attorney. In practice, much of the time of the criminal trial attorney is spent reviewing facts with the defendant in order to see that details previously forgotten are remembered, and that defendant's recollection or version of the facts is presented not only correctly, but in a manner to the trier of facts so that the defendant is not likely to be misunderstood or his testimony or recollection misconstrued. The proper preparation of a witness who is to testify is indeed an affirmative obligation of the attorney. The trial judge's decision in this case has the effect of saying to the defense attorney that if he uses certain methods for memory refreshment for the defendant, he may run the risk of preventing his client from testifying at all. The same argument used against hypnosis for memory recollection could be used against other schools of psychiatry or psychology which attempt to either improve or refresh a witness's memory without the use of hypnosis.

Without the information developed by the use of hypnosis on petitioner, the defense attorneys would never have known the safety device and trigger were defective and that the gun discharged without her pulling the trigger. The information was the basis for having certain tests done, which in turn led to expert testimony which proved very conclusively that the gun was susceptible of being discharged without pulling the trigger. These characteristics of the gun were not discovered and would not have been meaningful without the recollected memory. It is

submitted that petitioner as a matter of right was entitled not only to testify to the jury that the gun could discharge without her having pulled the trigger, but that in fact she believed that such was the case.

In concluding its discussion of the due process issue, the Arkansas Supreme Court stated "any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court", (Appendix A to the petition, page xiv). That statement ignores the fact that the hypnotic session with the defendant was lawful. It was not prohibited by the Uniform Rules of Evidence. The procedure was not prohibited or even discouraged under the Code of Professional Responsibility for Attorneys. It also ignores the fact that nothing in Arkansas law required the disclosure by defendant or defendant's counsel prior to the trial that the hypnotic session had been held. Rule 18, Arkansas Rules of Criminal Procedure. Petitioner submits the suggestion of self-induced error is singularly inappropriate under the circumstances and the Arkansas Supreme Court's result is too harsh to be tolerated within the context of due process of law.

The state has argued.[1] and the Arkansas Supreme Court implied[2] in its opinion that petitioner's defense coun-

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[1] The state argued that "her difficulties in testifying at the trial were engendered by her trial counsel's reckless, headlong plunge into the controversial area of hypnotically refreshed testimony without permission from or even notice to the trial court." Brief for Appellee at the Arkansas Supreme Court, page 10.

[2] The Supreme Court noted " . . . any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court." 288 Ark. at 580, Appendix A to the petition, page xiv.

sel did something improper and without precedent. Mr. Putman's actions were complete consistent with procedure tacitly approved by the Arkansas Supreme Court more than twenty months prior to the hypnotic session arranged by Mr. Putman, and was consistent with the right to testify guaranteed by the Arkansas Constitution, Article 2, Section 10.[3] Certainly the state cannot hold Mr. Putman to a more rigid standard than it holds the prosecution.

The right to effective counsel and the right to prepare are clearly a part of due process under the Fourteenth Amendment. *Glasser v. United States*, 315 U.S. 60 (1942), *In re Oliver*, supra. Petitioner submits that the decision of the Arkansas Supreme Court if allowed to stand would greatly curtail that right.

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[3] In *Clines v. State*, 280 Ark. 77, 656 SW 2d 684 (1983) a capital murder case arising in the same circuit court with the same prosecuting attorney as the instant case, the prosecuting attorney had two key eye-witnesses hypnotized to enhance their testimony without disclosing that fact to the court or to defense counsel. Both witnesses testified and defendants were convicted and sentenced to death. After the case had been appealed to the Arkansas Supreme Court, but before any decision had been made, one of the defense counsel, an associate of Vickie Rock's attorney, W. B. Putman, learned of the hypnosis and filed a motion with the Arkansas Supreme Court to stay the appellate proceedings and to remand for an evidentiary hearing on the newly discovered evidence on the basis of *People v. Shirley*, supra. By order entered January 10, 1983, the motion was denied without opinion. On July 5, 1983, the Arkansas Supreme Court affirmed the convictions without mention of the hypnosis issue raised. On July 21, 1983, the defendant's moved for a rehearing which was denied on October 3, 1983, without opinion.

III.

THE LIMITATION OF PETITIONER'S TESTIMONY TO PRE-HYPNOTIC STATEMENTS MADE TO THE HYPNOTIST WAS ARBITRARY AND UNREASONABLE TO THE EXTENT THAT IT VIOLATED DUE PROCESS OF LAW.

The exact wording of the pre-trial order, that Vickie Rock could "testify to matters remembered and stated to the examiner prior to being placed under hypnosis" (Appendix A to the petition, page xvii) leaves an extremely puzzling question in its wake, and that is, why limit her testimony only to those things she said to the hypnotist as opposed to statements made to the police, or her lawyers, or her psychologist, all of which could be easily dated. The trial court did not attempt to explain what the special significance of the pre-hypnotic statement made to the neuropsychologist was that caused it to rely on that as a basis for the limitation as opposed to any of the other numerous pre-hypnotic statements made by Vickie Rock. The Arkansas Supreme Court makes no attempt to explain the significance.

The ruling in that sense places the hypnotist in the really unique position of determining prior to the hypnotic session what matters the jury will be allowed to hear, a role for which she is not trained and which she did not in any way anticipate. The future application of the rule would obviously inject the hypnotist into the trial process in a way for which there are no safeguards against abuse by either the state or the defense.

The attempt by defense counsel to introduce a pre-hypnotic statement made to the police as a basis for the expansion of her testimony was refused by the trial court.

(J.A. 105) The refusal was upheld by the Arkansas Supreme Court on the basis that the statement was made after a motive to falsify had arisen. (Appendix A to the petition, pages xiv, xv) The Court did not discuss or attempt to explain why that pre-hypnotic statement was less reliable as an indicator of pre-hypnotic memory than the statement to the hypnotist. There appears to be a determination that establishment of pre-hypnotic memory was not the purpose of the exhibit, but the offer by counsel clearly indicates that it was. (J.A. 104, 105) There is no explanation as to why much earlier statements made to two police officers (J.A. 3) were considered less reliable as indicators of her pre-hypnotic memory.

In short, the selection of the hypnotist's pre-hypnotic interview as the sole reference as to what was pre-hypnotic and what was post-hypnotic memory was without any legal, logical or psychological basis, and as such is arbitrary and lacking in basic fairness to petitioner. Arbitrary rules that deny a defendant the ability to present a defense, especially when based on some *a priori* categorization are clearly violative of the Constitution. *Washington v. Texas*, 388 U.S. 14 (1967).

IV.

THE APPLICATION OF THE PRE-TRIAL ORDER AT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW.

One good measure of the soundness of a rule is the amount of confusion it causes in the attempt to enforce it. Nowhere is that more evident than in the attempt by the trial judge to enforce the pre-trial order.

When Vickie Rock began to testify about the events surrounding the death of her husband, her testimony was

repeatedly interrupted by objections from the prosecuting attorney on the basis of violation of the pre-trial order. With almost every objection, the trial court redefined the limits of the order.

On the first objection by the prosecutor on grounds of violation of the order, the Court redefined the excluded matter as anything not included in the pre-hypnotic session as far as the day of the crime was concerned. (J.A. 11) On the second, the Court said she would be limited to matters she recalled at the time of the pre-hypnotic sessions whether it was in the statement or not. (J.A. 13) The Court then said that it would be limited to what was in the hypnotist's notes. (J.A. 13) On the next objection, the limit changed to what she recalled and told the doctor. (J.A. 15) The next description was that "she not be allowed to testify to things that she now remembers that she did not remember prior to being placed under hypnosis." (J.A. 16) The next restatement was to limit the testimony to the notes taken by the psychologist and the testimony given by her at the pre-trial hearing. (J.A. 17) On the next objection the Court returned to the wording of the pre-trial order. (J.A. 24) Next, the Court limited the testimony in time to things occurring prior to the discharge of the gun (J.A. 35), and finally returned to limiting the testimony to what was in the notes. (J.A. 36)

Nearly all of the interchanges between the trial court and counsel took place with petitioner on the witness stand and in sight of the jury. (J.A. 11-J.A. 20) Much of the interchange took place within the hearing of the jury. (J.A. 16-J.A.20).

Finally, the trial court permitted the prosecuting attorney to re-cross examine Vickie Rock on her recollection

of the testimony of the psychologist at the post-hypnosis, pre-trial hearing. (J.A. 113-J.A. 120)

With at least nine changes in the limitation of her testimony and the experience of being cross-examined on her memory of the psychologist's testimony at a pre-trial hearing, it is not surprising that petitioner would have extreme difficulty in trying to explain her case to the jury. The verdict shows what the jury perceived.

The trial court was trying to be fair, but no matter how hard he tried, the fairness was lacking because the rule he was trying to enforce was patently unenforceable. The effort itself caused the proceeding to lack basic fairness, and that fairness is required by the Constitution. *In re Oliver,* 333 U.S. 257 (1948). Accordingly, petitioner should be granted a new trial even if the Arkansas evidentiary rule is allowed to stand.

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CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed and a new trial granted for Petitioner.

Respectfully submitted,

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